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## Protecting the City of London? UK challenges before the Court of Justice of the European Union

Pierre Schammo\*

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In the February edition of this journal, I referred to a number of legal challenges launched by the UK before the Court of Justice of the European Union (CJEU or the Court). These challenges concern:

- (i) a proposed financial transaction tax (ie, the Council decision authorizing closer cooperation between a group of Member States on a financial transaction tax);
- (ii) the European Central Bank's location policy under which central counterparties that clear sizeable amounts of Euro denominated derivatives are meant to be located in the Eurozone area;
- (iii) a provision – Article 28 – of the EU short selling regulation which vests the European Securities and Markets Authority (ESMA) with intervention powers; and
- (iv) the so-called bankers' bonuses cap under EU capital requirements legislation.

From the UK's perspective, all of the above measures threaten the national interest and especially the interests of the City of London as an international financial centre. In the February edition, I focused in particular on the UK's challenge to Article 28 of the short selling regulation. As a reminder, in challenging Article 28, the UK sought to limit the powers which the short selling regulation vests in ESMA. Specifically, the UK claimed that Article 28 was unlawful because:

- (i) it was adopted on the wrong legal basis: that is, Article 114 of the Treaty on the Functioning of the European Union (TFEU);
- (ii) it was contrary to the Court's decisions in *Meroni* and *Romano*;<sup>1</sup> and
- (iii) it was unlawful in view of the new Treaty provisions on delegated and implementing acts (Articles 290 and 291 TFEU).

Importantly, Advocate General (AG) Jääskinen in its non-binding opinion accepted the UK's claim that Article 114 was an inappropriate legal basis.

However the Grand Chamber of the CJEU in its judgment decided not to follow the conclusions of AG Jääskinen and rejected all of the UK's submissions.<sup>2</sup> First of all, the CJEU did not find that Article 28 was contrary to the Court's decisions in *Meroni*. As a reminder in *Meroni*, the Court ruled that wide discretionary powers

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\* Durham University, School of Law.

<sup>1</sup> Case 9/56 *Meroni v High Authority* [1958] ECR 133; Case 98/80 *Romano v Institut national d'assurance maladie-invalidité* [1981] ECR 1241.

<sup>2</sup> Case C-270/12 *United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union* [2014] ECR I-0000.

could not be delegated to an outside body and that a delegator could not delegate powers that were different from its own powers. In the short selling case, the Court ruled that ESMA's powers under Article 28 satisfied the requirements laid down in *Meroni* since they were 'precisely delineated and amenable to judicial review in the light of the objectives established by the delegating authority'.<sup>3</sup> By assessing ESMA's powers in this manner, the Court made it plain that it was not ready to abandon the *Meroni* decision, even though the judgment stems from an altogether different era and Community (ie, the European Coal and Steel Community). However it is also apparent that the Court will not adopt a narrow reading of the *Meroni* requirements and that it will not easily accept that a delegation of powers is contrary to these requirements.

The Court had also little sympathy for the UK's argument that Article 28 was contrary to the Court's decision in *Romano*.<sup>4</sup> In this case, the CJEU held that it was not permissible to delegate powers that allowed a body to adopt 'acts having the force of law'.<sup>5</sup> However in the short selling case, the Court decided that even though ESMA could adopt 'measures of general application'<sup>6</sup> under Article 28, this did not mean that Article 28 was 'at odds with the principle established in *Romano*'.<sup>7</sup> This was so because of Treaty provisions which expressly allowed agencies to adopt such acts.<sup>8</sup>

Regarding the claim that the delegation was incompatible with Articles 290 and 291 TFEU, the CJEU concluded that a conferral of powers under Article 28 was different from the situations which these Treaty provisions covered.<sup>9</sup> Article 28 could not be said to undermine them.<sup>10</sup> Last but not least, on the question of whether Article 114 TFEU was the right legal basis, the Court took a markedly different approach to that of AG Jääskinen. In his opinion, the latter argued that Article 114 TFEU was an inappropriate legal basis. This was so because using Article 28 did not result in harmonization, but rather 'the replacement of national decision making ... with EU level decision making'.<sup>11</sup> However, the CJEU decided that the EU legislature could rely on Article 114 TFEU. By taking this route and rejecting the UK's submission, the Court showed – as it had done before – its willingness to interpret the scope of Article 114 broadly. Moreover, it readily agreed with the reasoning that the EU legislature put forward in the recitals to the short selling regulation in order to justify its measures.<sup>12</sup> Admittedly, if the Court had accepted the AG's proposals, the consequences would have been dire for the European System of Financial Supervision. It was always unlikely that the Court would take this route, not least because of its previous case law on Article 114 TFEU.

The short selling case is however not the only UK challenge which has been decided since the beginning of the year. In late April, the CJEU ruled on the UK's action against the decision authorizing enhanced cooperation in the area of the financial transaction tax.<sup>13</sup> This challenge followed the decision of a group of Member

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<sup>3</sup> para 53.

<sup>4</sup> Case 98/80 *Romano* (n 1).

<sup>5</sup> *Ibid* 20.

<sup>6</sup> Case C-270/12 *UK v European Parliament and Council* (n 2), para 64.

<sup>7</sup> *Ibid*, para 65.

<sup>8</sup> *Ibid*.

<sup>9</sup> *Ibid*, para 83.

<sup>10</sup> *Ibid*, para 86.

<sup>11</sup> Opinion of AG Jääskinen in Case C-270/12 *UK v European Parliament and Council* (n 2), para 52.

<sup>12</sup> See paras 113 and 114 of the judgment.

<sup>13</sup> Case C-209/13 *United Kingdom of Great Britain and Northern Ireland v Council of the European Union* [2014] ECR I-0000.

States to press ahead with the idea of a financial transaction tax after that Member States had failed to reach agreement on introducing such a tax on a Union-wide basis.<sup>14</sup> The UK was among the Member States that were opposed to the measure, as it saw it as a threat to the City of London. The Court's judgment is short. It simply dismisses the UK's challenge on procedural grounds. To come to this decision, the CJEU differentiated between a decision authorizing enhanced cooperation among a group of Member States – which was the subject matter of the UK challenge – and the measures which are finally adopted in order to implement enhanced cooperation in a given area. The Court dismissed the UK's action because it concluded that the UK's submissions were not in fact directed at the decision authorizing enhanced cooperation. To be sure, this challenge was also unlikely to succeed, a fact that did not escape the UK government. Indeed, the latter acknowledged in its submissions that its action might be 'premature', but nevertheless considered it to be necessary 'as a precautionary measure'.<sup>15</sup> Thus, the last word on the matter might not yet have been spoken: once the Council directive which implements enhanced cooperation in the area of a financial transaction tax is adopted, the UK might well decide to bring another challenge if it believes that the directive impinges on its interests and especially on those of the City of London.

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<sup>14</sup> The Treaties allow Member States to resort to enhanced cooperation in such a case provided that certain conditions are met. See Art 20 Treaty on European Union (TEU); Arts 326-334 TFEU.

<sup>15</sup> Ibid.